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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 80

THE CHOCTAW NATION OF INDIANS,
PETITIONER,

vs.

THE UNITED STATES AND THE CHICKASAW
NATION OF INDIANS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 23, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1170

THE CHOCTAW NATION OF INDIANS, PETITIONER,

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THE UNITED STATES AND THE CHICKASAW NATION OF INDIANS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX.

[fol. 1] **IN THE UNITED STATES COURT OF CLAIMS**

No. K-336

THE CHICKASAW NATION, Complainant,

vs.

THE UNITED STATES OF AMERICA, and the CHOCTAW NATION, Defendants

PETITION—Filed August 5, 1929

Comes now the Chickasaw Nation, the complainant herein, and for its cause of action against the United States of America, respectfully represents to the court:

I

The Chickasaw Nation, the complainant herein, is the Chickasaw Indian Nation or Tribe mentioned in the Act of Congress approved June 7, 1924 (43 Stat., 537), the first paragraph of which act is as follows:

[fol. 2] "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or the statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States';

and by the Act of Congress approved February 19, 1929 (Public Resolution 88, 70th Congress) the time for the filing of such suits was extended to June 30, 1930.

II

Title and ownership in and to the lands which are the subject matter of this suit were acquired by the Choctaw and

Chickasaw Nations under treaties or agreements with the United States of America as follows:

Treaty of 1820 (7 Stat., 210).
Treaty of 1830 (7 Stat., 333).
Treaty of 1837 (11 Stat., 573).
Treaty of 1855 (11 Stat., 611).
Treaty of 1866 (14 Stat., 769).

[fol. 3]

III

Under Articles I and III of the treaty of 1837 (11 Stat., 573) the Chickasaw Nation, for a valuable consideration, purchased a common interest in the lands of the Choctaw Nation.

IV

Under Article I of the Treaty of 1855, the title to, and ownership of, the Choctaw and Chickasaw Nations, in and to such lands, was guaranteed and defined, as follows:

"And pursuant to an Act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* no part thereof shall ever be sold without the consent of both tribes; * * *"

V

All moneys resulting from the sale of tribal lands and properties of the Choctaws and Chickasaws, so held and owned, has always been paid to the Choctaw and Chickasaw Nations, by the United States, under all treaties and laws, in the proportions of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

[fol. 4]

VI

Under the treaty between the United States and the Choctaw and Chickasaw Nations, known as the "Atoka Agreement" (Act of Congress approved June 28, 1898, 30 Stat., 495) and the "Supplementary Agreement" (Act of Congress approved July 1, 1902, 32 Stat., 641) providing

for the distribution of the tribal estates of the Choctaw and Chickasaw Nations, in preparation for Oklahoma Statehood, Choctaw and Chickasaw Freedmen were given allotments of forty acres each, coupled with provisions safeguarding the rights of the Choctaw and Chickasaw Nations in the lands allotted to such Freedmen, as between the two nations, and as between them and the United States.

VII

The Chickasaw Nation claims that it has a one-fourth interest in the lands allotted to Choctaw Freedmen; that, being a common owner (with the Choctaw Nation) in such lands so allotted, and never having participated in the alleged adoption of such Choctaw Freedmen, that their adoption by the Choctaw Nation was null and void, in so far as the interests of the Chickasaw Nation are concerned; that it agreed that allotments be made to such Choctaw Freedmen only after the insertion, upon its insistence, in the said treaties of 1898 and 1902, of definite and specific provisions [fol. 5] for the adjustment of, and settlement for its interest in the lands so allotted such Choctaw Freedmen, as between the Chickasaw Nation and the Choctaw Nation and also as between the Chickasaw Nation and the United States; that such provisions for the adjustment of, and settlement for, its interest in such lands, have not been carried out; and that it is now entitled to have judgment against the United States for the fair value of its one-fourth interest in such lands so allotted such Choctaw Freedmen.

VIII

Article III of the treaty of 1866 (14 Stat., 759), between the United States and the Choctaw and Chickasaw Nations, relating to Choctaw and Chickasaw Freedmen, is as follows:

"The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, *known as the leased district*, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons

of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, except in the annuities, moneys, and public domain claimed by, or belonging [fol. 6] to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to move; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred [fol. 7] thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

IX

By an act of its general council, approved May 21, 1883, the Choctaw Nation attempted to adopt the Choctaw Freedmen. Such act set out:

"* * * the inability of the Choctaw Nation to prevail upon the Chickasaws to adopt any joint plan for adopting said Freedmen * * *"

The Chickasaw Nation never took any action, by cooperation with the Choctaw Nation or otherwise, for the adoption of Choctaw Freedmen and no action was ever taken by it that could be construed as a waiver or surrender of its interest in the lands which were allotted Choctaw Freedmen, under the said treaties of 1898 and 1902.

X

Chickasaw Freedmen were never adopted; and the Choctaw and Chickasaw Nations have been compensated for the lands allotted to them, as will hereinafter appear.

XI

Throughout all the years intervening, from 1866 until the said treaties of 1898 and 1902 were entered into, the status of Choctaw and Chickasaw Freedmen was a matter of [Vol. 8] dispute between the Choctaw and Chickasaw Nations and between such nations and the United States; and provisions were agreed upon and inserted in the treaties of 1898 and 1902, fixing the status of Choctaw and Chickasaw Freedmen and for the adjustment and settlement of all questions of dispute relating to them.

XII

In the "Atoka Agreement" (Act of Congress approved June 28, 1898, 30 Stat., 495) the Choctaw and Chickasaw Nations agreed that allotments of forty acres each might be made to Choctaw and Chickasaw Freedmen, but, in view of the fact that there was no claim of adoption, either by or for Chickasaw Freedmen, it was provided:

"That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw Freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw Tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by Act of Congress."

XIII

The Chickasaw Nation, having always claimed and insisted that the adoption of Choctaw Freedmen, without their [fol. 9] participation or consent, was null and void, in so far as their common interest in the lands proposed to be allotted to them was concerned, proposed, as a condition precedent to their agreement that lands be allotted to Choctaw Freedmen, that there should be an adjustment, and settlement for, their interest in such lands, either by having them deducted from the allotments of Choctaw citizens or otherwise, by the insertion of a provision for their protection, to that end, and such a provision was agreed upon and inserted in such treaty, as follows:

"That the lands allotted to the Choctaw and Chickasaw Freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw Tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same."

XIV

Thus the matter of the contention of the Chickasaw Nation for an adjustment of, and settlement for its interest in the lands to be allotted Choctaw Freedmen stood, without further action, until the "Supplementary Agreement" (Act of Congress approved July 1, 1902, 32 Stat., 641) was entered into.

XV

Such treaty provided for carrying out the plan for allotments of forty acres each to Choctaw and Chickasaw Freed-[fol. 10] men, as provided in the said treaty of 1898, but included a more definite and specific plan for safeguarding the rights and interests of the Choctaw and Chickasaw Nations in the lands to be allotted to such freedmen.

XVI

As to Chickasaw Freedmen, it was provided that a test suit should be filed in the United States Court of Claims (with right of appeal to the Supreme Court of the United States).

"• • • to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chicka-

saw Nation and the rights of such Freedmen in the lands of the Choctaw and Chickasaw Nations * * *"

and that

"* * * in the event that it shall be finally determined in said suit that the Chickasaw Freedmen were not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations, according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw Freedmen * * *."

XVII

The Chickasaw Nation, still claiming and insisting (as was claimed and insisted when the said treaty of 1898 was entered into) that it was entitled to an adjustment of, and settlement for, its interest in the lands allotted Choctaw Freedmen, proposed the insertion, in such treaty, of a [fol. 11] further and more definite and specific provision to that end, and accordingly, it was done, as follows:

"*Provided*, that nothing contained in this paragraph (relating to the final decree in the Chickasaw Freedmen suit) shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

XVIII

The final decision of the Supreme Court of the United States in the case of "*United States and Chickasaw Freedmen* v. *Choctaw Nation and Chickasaw Nation*" (193 U. S., 115), was rendered on February 23, 1904, in which it was held that Chickasaw Freedmen had no rights in the lands of the Choctaw and Chickasaw Nations which had been allotted to them. Then, after the roll of such Chickasaw Freedmen had been completed and the total number of acres of land allotted to them had been determined, and the total value of such lands had been computed, as directed by the said treaty of 1903, there was appropriated, under the Indian Appropriation Act of Con-

gress, approved June 25, 1910, in satisfaction of the final judgment of the Court of Claims, in the Chickasaw Freedmen case, the sum of six hundred and six thousand, nine hundred and thirty-six dollars and eight cents ($606,936.08). This sum of money was placed to the credit of the Choctaw [fol. 12] and Chickasaw Nations, in proportion of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

XIX

The tribal officials of the Chickasaw Nations still claiming and insisting that it was entitled to an adjustment of, and a settlement for, its interest in the lands allotted to Choctaw Freedmen and claiming and insisting, further, that, under the definite and specific provisions which had been inserted in the said treaties of 1898 and 1902, for such adjustment and settlement, demanded of the proper officials of the United States that the sum of money (to-wit, $606,936.08) appropriated for the satisfaction of the judgment in the Chickasaw freedmen case, be subjected, first, to the payment to the Chickasaw Nation of the compensation due it for its one-fourth interest in the lands allotted to Choctaw Freedmen; and that the balance thereof, if any, be then placed to the credit of the Choctaw and Chickasaw Nations, in the proportion of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

XX

This demand was refused by the officials of the United States; and they proceeded to place three-fourths of such total sum to the credit of the Choctaw Nation and one-[fol. 13] fourth of such total sum to the credit of the Chickasaw Nation, in violation of the rights of the Chickasaw Nation and ignoring the definite and specific provisions of the said treaties of 1898 and 1902, which had been inserted therein, upon their insistence, for the adjustment of, and settlement for, their one-fourth interest in the lands theretofore allotted to Choctaw Freedmen.

XXI

The jurisdictional act of June 7, 1924 (referred to and partly set out in Paragraph I of this petition) affords the Chickasaw Nation an opportunity to have a judicial

determination of its rights in and to the lands allotted to Choctaw Freedmen and of its claim for compensation therefor; and it is for that purpose that this petition is filed.

XXII

Wherefore, the Chickasaw Nation prays that an order be entered by this court requiring the proper officers of the United States to prepare and file, in this suit, a statement of the total number of Choctaw Freedmen to whom allotments of the lands of the Choctaw and Chickasaw Nations have been made, the total number of acres of such lands so allotted, to such Choctaw Freedmen, and also a statement of the total value of such lands, computed upon the basis of twice the value thereof, placed upon [fol. 14] such lands for purposes of allotment; and the Chickasaw Nation prays further that it may have judgment against the United States for one-fourth such total sum, together with interest at the rate of five per centum per annum from the date of the completion of allotments to such Choctaw Freedmen, and for all other and further relief to which the court may find it entitled.

William H. Fuller, Melven Cornish, Special Attorneys for the Chickasaw Nation. G. G. McVay, National Attorney for the Chickasaw Nation.

STATE OF OKLAHOMA,
County of Pittsburg, ss:

William H. Fuller, being duly sworn on oath states that he is the William H. Fuller employed by Douglas H. Johnston, Governor of the Chickasaw Nation as attorney, under contract executed pursuant to the provisions of the Act of Congress approved June 7, 1924 (Public Document No. 222, 68th Congress), and which said contract was thereafter duly approved by the Commissioner of Indian Affairs on January 5, 1926, and by the Assistant Secretary of the Interior on January 12, 1926, and is authorized to and does make this verification.

That he has read the foregoing petition and knows the contents thereof, and that the statements therein contained [fols. 15-16] are based upon the treaties and statutes referred to in said petition and upon information obtained from the records in the office of the Secretary of the In-

terior and his subordinate officers and are true and correct as affiant verily believes.

William H. Fuller

Subscribed and sworn to before me on this 1st day of August, 1929. Sarah Miller, Notary Public. (Seal) My commission expires Jan. 5, 1932.

[fols. 17-18] II. General Traverse—Filed September 14, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Substitution of Attorney of Record

On December 9, 1938, Melven Cornish, Esq., filed a motion to be substituted as attorney of record with consent of William H. Fuller, present attorney.

Said motion was allowed by the court December 10, 1938, and Mr. Cornish was entered as attorney of record.

IV. Proceedings Relative to the Choctaw Nation

On December 14, 1939, the United States filed a motion to bring in and make The Choctaw Nation a party defendant to this suit, and for an Order that petition in interpleader be filed.

Said motion was allowed on January 2, 1940, and petition in interpleader was filed, which is as follows:

[fol. 19] V. Petition in Interpleader of the United States of America against the Choctaw Nation or Tribe of Indians—Filed January 2, 1940

For its cause of action against the Choctaw Nation or Tribe of Indians which has been impleaded herein and made a party defendant to this suit by order of this Court in response to a motion of the United States, the United States alleges and shows unto the Court:

1. That plaintiff seeks to recover from the Government one-fourth of the value of those lands of the Choctaw and Chickasaw Nations which were allotted to Choctaw Freed-

men many years ago. Plaintiff alleges that it has never agreed to the allotment to Choctaw Freedmen of any of the lands belonging to the Choctaw and Chickasaw Nations, and that the Government wrongfully allotted a large area of such land, in which plaintiff had an undivided one-fourth interest, to the Choctaw Freedmen.

[fol. 20] 2. That should the Court find that the allegations in plaintiff's petition are true, it would be apparent that the Choctaw Nation has heretofore unlawfully benefited to the extent of whatever money judgment might be found due plaintiff, and that any judgment herein should be against the Choctaw Nation and not against the United States of America.

For these reasons defendant respectfully prays that, in the event the Court finds or adjudges that the Chickasaw Nation is entitled to recover a judgment herein for an interest in the lands as prayed for in its petition, such judgment be awarded against the Choctaw Nation and not against the United States of America.

Respectfully submitted, Norman M. Littell, Assistant Attorney General; Raymond T. Nagle, Special Assistant to the Attorney General; Charles H. Small, Attorney.

[fol. 21] VI. Answer to the Petition in Interpleader of the United States of America against the Choctaw Nation, or Tribe of Indians—Filed March 19, 1941, by leave of court

Comes now the Choctaw Nation, or Tribe of Indians, and for its answer to the Petition in Interpleader of the United States against the Choctaw Nation, or Tribe of Indians, in the above styled action, says:

That it denies each and every allegation contained in said petition, except that which is hereinafter specifically admitted.

I

The Choctaw Nation states that it adopted their freedmen [fol. 22] by Act of its Choctaw Council of May 21, 1883 (Laws Choctaw Nation, page 335), and the Chickasaws consented to said adoption by ratification of the "Atoka Agreement" approved by Act of Congress June 28, 1898, 30 Stat.

495, and the "Supplementary Agreement" (Act of Congress approved July 1st, 1902, 32 Stat. 641), and by such action if the Chickasaws ever had any interest in the lands allotted to the Choctaw Freedmen, it waived and surrendered said interest.

II

Further answering, the Choctaw Nation says that by the Acts of 1898 and 1902, which contained agreements between the United States and the Choctaw and Chickasaw Nations, the Chickasaw Nation consented to the allotment of forty acres of land of average value to the said Choctaw Freedmen, without in any manner providing for any money payment to them of a one quarter interest in the value of the lands so allotted, and by reason thereof is now estopped from attempting to assert any claim for its alleged interest in the forty-acre allotments to the Choctaw Freedmen.

III

Under the provision of the "Atoka Agreement", approved June 28, 1898, the Chickasaw Freedmen were given allotments of forty acres of Choctaw and Chickasaw lands of average value to be used by them until their rights under said treaty should be determined in such manner as there-[fol. 23] after provided by Congress. By the agreement of 1902, 32 Stat. 641, it was provided that the question of such rights should be determined by the courts. This was done and a money judgment awarded to the Choctaw and Chickasaw Nations, but no such provision relating to Choctaw Freedmen nor any like provisions appear in either the agreement of 1898 or that of 1902, and by reason thereof the Chickasaw Nation is not entitled to be paid for any proportionate part of the value of the lands allotted to the Choctaw Freedmen.

Wherefore, the Choctaw Nation prays that no judgment herein be made, given or entered against the Choctaw Nation in favor of either the United States of America or the Chickasaw Nation.

William G. Stigler, Choctaw National Attorney.

[fol. 24] VII. Argument and Submission of Case

On October 6, 1941, argument of the case on merits was begun by Mr. Melven Cornish for plaintiff.

On October 7, argument of the case on merits for plaintiff was concluded by Mr. Melven Cornish, and case submitted, and the case was argued and submitted on merits for defendant, the United States, by Mr. Charles H. Small; and for The Choctaw Nation, defendant, by Mr. W. G. Stigler.

[fol. 25] VIII. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Madden, J.**—Filed December 1, 1941

Mr. Melven Cornish for plaintiff.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the United States. *Mr. Raymond T. Nagle* was on the brief.

Mr. William G. Stigler for the Choctaw Nation.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. This suit was filed pursuant to an act of Congress of June 7, 1924 (43 Stat. 537), which so far as here material, provided as follows:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or the statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Choctaw and Chickasaw Indian Nations or Tribes, or either of them, or arising under or growing out of any Act of Congress in relation to Indian affairs which said Choctaw and Chickasaw Nations [fol. 26] or Tribes may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

The time for filing such suits was extended to June 30, 1930 by a Joint Resolution of February 19, 1929 (45 Stat. 1229, 1230).

2. The treaty of April 28, 1866 (14 Stat. 769), between the United States and the Choctaw and Chickasaw Nations, provided, *inter alia*, as follows:

* * * * * * *

Article II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

Article III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five percent, in trust for said nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate [fol. 27] of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should the said laws, rules, and regulations not be made

by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Article III was not complied with within the two year period by either the Choctaws or the Chickasaws. The United States did not remove any freedmen pursuant to the treaty.

3. By an act of Congress approved May 17, 1882 (22 Stat. 68, 73), the sum of $10,000 was appropriated out of the $300,000 reserved by article III of the treaty of 1866 for the education of the freedmen of the Choctaw and Chickasaw Nations. It was provided that either tribe might, before the expenditure was made, adopt its freedmen in accordance with article III of the treaty of 1866 and in such case the money provided for education would be paid over to the tribe, in its proper share.

By a measure of the general council of the Choctaw Nation approved May 21, 1883, entitled "*An Act to adopt the freedmen of the Choctaw Nation*," enacted in conformity with the act of Congress approved May 17, 1882 (supra), the Choctaw Nation adopted its freedmen. Sections 1 and 3 provided:

SEC. 1. Be it enacted by the General Council of the Choc- [fol. 28] taw Nation assembled, that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, Sept. 13, 1865, and their descendants formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of

suffrage of citizens of the Choctaw Nation, except in the annuities moneys and the public domain of the nation.

SEC. 3. Be it further enacted, that all said persons are hereby declared to be entitled to forty acres each of the lands of the nation, to be selected and held by them under the same title and upon the same terms as the Choctaws.

No permanent allotments were ever made under this legislation.

The Chickasaws did not adopt their freedmen and objected to allotments to the Choctaw freedmen out of the commonly owned lands.

4. The Chickasaw Nation, the Choctaw Nation, and the members of the Dawes Commission to the Five Civilized Tribes, on behalf of the United States, entered into an agreement on April 23, 1897, known as the "Atoka" agreement, providing for allotments in severalty of their common lands and the sale or disposition of other common properties of the tribes. This agreement, as amended, was ratified and confirmed by the Curtis act (30 Stat. 495, 503), and made a part thereof, and was subsequently approved by a majority vote of the members of each of the tribes.

5. The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaws Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present.

The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:

Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value [fol. 29] of the same and not affect the value of the allotments to the Chickasaws.

The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

6. The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing

for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,

> • • • to be selected, held and used by them until their rights under said treaty [the Treaty of 1866], shall be determined, in such manner as shall hereafter be provided by Act of Congress;

and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen, as follows:

> That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

7. The Chickasaw Nation, the Choctaw Nation, and the United States, entered into a further agreement on March 21, 1902 (32 Stat. 641). This agreement, known as the "Supplemental" agreement, contained detailed provisions for the enrollment of the members and freedmen of the Choctaw and Chickasaw Nations, the appraisement and allotment of the common lands in severalty to the members and freedmen of the two tribes, the sale of the residue of such lands after allotments had been made and equalized, and the reservation and sale or disposition otherwise of the common properties of the two tribes, and the distribution of all moneys arising therefrom.

8. The Supplemental Agreement provided in sections 36 to 40, inclusive, for a suit in the United States Court of Claims, with right of appeal to the Supreme Court, to test the rights of the Chickasaw freedmen to the commonly [fol. 30] owned lands allot-ed to them under the Atoka Agreement. These sections appeared under the heading "Chickasaw Freedmen."

Sections 36, 37, and 40 provided:

> 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Na-

tion and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

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40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freed-
[fol. 31] men: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

It was provided in section 68 that:

No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

9. At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the commonly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.

10. Suit was brought as provided in sections 36-40 of the Supplemental Agreement. Judgment for $606,936.08 was rendered against the United States and paid to the two nations, in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws (38 C. Cls. 558, 193 U. S. 115).

11. In that suit, prior to the entry of final judgment on January 24, 1910, the Choctaws filed an "Application for Additional Decree" in which they set out that the Chickasaws were entitled to pay for their proportionate interest in the commonly owned lands allotted to the Choctaw freedmen and requested the court to enter a supplemental decree deducting from their proportionate share of the judgment one-fourth of the value of the jointly held lands allot-ed to the Choctaw freedmen and add that amount to the amount to be apportioned to the Chickasaw nation under the judgment.

No action was ever taken by the Court on this request.

12. On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ separate counsel for the [fol. 32] Chickasaw Nation and setting out in support of his request the Chickasaws' claim for compensation for lands allotted to the Choctaw freedmen out of the common domain of the two nations without the consent of the Chickasaws

and pointed out that the Chickasaws had had no attorney to represent them at the time that judgment was entered in the suit brought pursuant to the Supplemental Agreement.

March 16, 1910, denial of the request was recommended by the Commissioner of Indian Affairs on the ground that in view of the admission of the Choctaws in their request for an additional decree, judicial action did not seem to be necessary to settle the controversy. A final determination was promised within ten days. No such determination seems ever to have been made.

13. The Chickasaw Nation has never received any compensation for its common interest in the lands allotted to the Choctaw Freedmen, by the reduction of the allotments of Choctaw Indian citizens, or by an adjustment or settlement otherwise.

14. The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover against the defendant, the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings. (See Rule 39a.)

Opinion

Madden, Judge, delivered the opinion of the court:

By a treaty between the United States and the tribes, the Chickasaw and Choctaw tribes of Indians held lands in [fol. 33] what is now Oklahoma "in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes took part in the Civil War on the side of the Confederacy. In 1865, by treaty, the tribes renewed their allegiance to the United

States and acknowledged themselves to be under its protection.[1]

In 1866 in a treaty between the United States and the tribes, the tribes agreed to abolish slavery. In Article III of the treaty, the tribes ceded to the United States a part of their territory, in consideration of the sum of $300,000 to be held in trust by the United States, until the legislatures of the tribes should within two years confer upon their former slaves, or freedmen the privileges of citizens, excepting rights in the "annuities, moneys, and public domain of the tribes," and also should give each freedman forty acres of land. It provided that if these benefits were not conferred upon the freedmen, the United States would remove the freedmen from among the Indians, and hold the money in trust for the freedmen.

The tribes did not adopt the specified legislation within the two-year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians without defined political status or property rights. In 1882 Congress again offered a financial inducement to either tribe which would adopt its freedmen in accordance with the terms of Article III of the treaty of 1866 (22 Stat. 68, 73). The Choctaws adopted legislation to this end in 1883, but attached qualifications which may have prevented it from complying with the treaty of 1866. This legislation probably conferred political rights upon the Choctaw freedmen, but there is no showing that any land was permanently allotted to them. Between this time and 1897 the Choctaws desired to give their freedmen allotments, and the Chickasaws were unwilling to adopt theirs, or to permit the Choctaws to give lands to the Choctaw freedmen out of the common tribal lands. In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) [fol. 34] negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freed-

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[1] See *The Chickasaw Freedmen*, 193 U. S. 115, affirming 38 C. Cls. 558, for a fuller recital of pertinent early history. For other phases of the present controversy, see *The Choctaw and Chickasaw Nations* v. *The United States*, 81 C. Cls. 63.

men should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands. The Chickasaw freedmen were not mentioned in the proposed agreement, it apparently being understood that they had not been adopted and had no rights.

Chairman Dawes was not present at Atoka, and when the proposed agreement was sent to Washington, it was modified before being enacted by Congress in 1898 as a part of the Curtis Act (30 Stat. 495, 505), to give the Chickasaw freedmen as well as the Choctaw freedmen forty-acre allotments, the allotments to the freedmen of each tribe to be subtracted from the allotments to the Indians of that tribe. Each tribe was, therefore, to furnish the land for its own freedmen. As to the Chickasaw freedmen it provided that they should each be allotted forty acres "to be selected, held, and used by them until their rights under said treaty [the treaty of 1866] shall be determined in such manner as shall be hereafter provided by act of Congress." The Atoka agreement as enacted by Congress was approved by a majority vote of the members of each of the tribes.

A "supplemental" agreement was made on March 21, 1902, between the United States and the two tribes, which was embodied on July 1 of that year in an act of Congress (32 Stat. 641) and ratified by the citizens of the two tribes. This agreement contained detailed provisions for the enrollment of the members and freedmen of the tribes, the allotment to each member of 320 acres instead of the allotment of all the land as in the Atoka agreement, the allotment to each Choctaw and Chickasaw freedman of 40 [fol. 35] acres, the sale of the remaining unallotted land and the distribution of the proceeds.[2]

The supplemental agreement had no provision analagous to the provision of the Atoka agreement as negotiated at Atoka requiring the Choctaws to provide for their own freedmen by subtracting from their own allotment, nor to

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[2] See *The Choctaw Nation* v. *The United States and The Chickasaw Nation*, 83 C. Cls. 140, 144.

the provision of that agreement as enacted by Congress making the same requirement of both the Choctaws and Chickasaws. It did, however, in section 36 take notice of the Chickasaw claim that its freedmen had no rights, by conferring authority upon the Court of Claims to determine whether such freedmen had rights in the tribal lands under the treaty of 1866 and subsequent legislation. To that end it directed the Attorney General of the United States to file a bill of interpleader in the Court of Claims against the Choctaws and Chickasaws and the Chickasaw freedmen.

Sections 40 and 68 of the supplemental agreement, as enacted by Congress, were as follows:

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Akota agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the [fol. 36] taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

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68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

The suit in the Court of Claims was filed, and the court held [3] that the Chickasaw freedmen had no rights prior to the enactment of the supplemental agreement. It therefore rendered judgment against the United States in favor of the two tribes in the proportion of one-fourth to the Chickasaws and three-fourths to the Choctaws [4] for the value of the land allotted to the Chickasaw freedmen. The amount of the judgment was ultimately determined to be $606,936.08 which was paid to the tribes in the specified proportions. Prior to the entry of final judgment in that suit on January 24, 1910, the Choctaws filed an "Application for Additional Decree" stating that the Chickasaws were entitled to be paid for their proportionate one-fourth interest in the commonly owned lands allotted to the Choctaw freedmen and requesting the court to enter a supplemental decree deducting the amount to which the Chickasaws would be thus entitled from the Choctaws' share of the instant judgment. This court did not act upon that request, apparently because it was beyond the scope of the enabling act under which the suit was brought.

On March 11, 1910, the Governor of the Chickasaw Nation wrote to the Commissioner of Indian Affairs requesting permission to employ counsel for the Chickasaw Nation and stating the Chickasaw claim which is the subject of this suit. This request was not acted upon, an interdepartmental [fol. 37] recommendation saying that in view of the Choctaws' admission of liability in their request for an additional decree, litigation would not seem necessary to settle the controversy.

The enabling act of Congress authorizing this suit was passed on June 7, 1924 (43 Stat. 537). The Chickasaws claim compensation for their one-fourth interest in the common tribal lands allotted to the Choctaw freedmen under the supplemental agreement of 1902, with interest.

The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive

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[3] *United States* v. *The Choctaw Nation*, 38 C. Cls. 558, affirmed sub nom. *The Chickasaw Freedmen*, 193 U. S. 115.

[4] These are the proper proportions recognized by treaties, statutes, and practice of the shares of the two tribes in such distributions. See *The Choctaw Nation* v. *the United States and the Chickasaw Nation of Indians*, 83 C. Cls. 140.

allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws; that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen; that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.

The defendants, the United States and the Choctaw Nation, assert that the Chickasaws assented, in the treaty of 1866, in the Atoka agreement as enacted by Congress in 1898, and in the supplemental agreement of 1902, to the adoption by the Choctaws of their freedmen and the allotment of land to them. Whatever may have been the power of the Choctaws, under the treaty standing alone, to make such a wholesale adoption,[5] and give such adopted persons [fol. 38] a share in the Chickasaws' interest in the lands, the whole history of the controversy shows that none of the parties ever so interpreted the treaty. The subject of the rights of the freedmen in the lands was a constant subject of negotiation. It was not regarded as settled, and was not settled by the treaty of 1866.

As to the Chickasaws' consenting in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land, there was, of course, consent. But it was given on terms. In the Atoka agreement the terms were that the Choctaws were to pro-

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[5] The Superintendent for the Five Civilized Tribes reported on July 26, 1939, that allotments had been made to 5,973 Choctaw freedmen of 266,435.13 acres of land, the appraised value of which for allotment purposes was $763,739.12.

vide the land for their own freedmen by subtracting from their own allotments. As that agreement was enacted by Congress, the same provision was made for the Chickasaws, but their freedmen's allotments were made temporary and subject to further determination as to their rights. So the consent there given was no consent to a provision for the Choctaw freedmen at the expense of the Chickasaws.

The supplemental agreement of 1902 is, therefore, the determining factor. That agreement, as we have said above, provided for permanent and unqualified allotments to both Choctaw and Chickasaw freedmen. It omitted the provision of the Atoka agreement for deduction from allotments to members. As to the Chickasaw freedmen, it provided for determination in the Court of Claims as to whether they were entitled to allotments from tribal lands, or whether the United States should supply those allotments at its expense. In section 68 it repealed inconsistent provisions of the Atoka agreement.

Plaintiff claims, and we have found, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

[fol. 39] This language is not well chosen for the purpose for which plaintiff claims and we find it was inserted. It relates, on its face, only to the matters "contained in this paragraph," and the paragraph relates to allotments to the Chickasaw freedmen and the suit in the Court of Claims to determine the rights of those freedmen, and of the rights of the two tribes to compensation for those allotments. Yet the determination of the matters to which the paragraph directly relates might well have had effects upon the question at issue in this litigation. If this court had held in that litigation that the Chickasaw freedmen were entitled to allotments from the tribal lands, there would have been

the question as to whether those allotments should be taken from the Chickasaw interest in the lands or from the interests of both tribes, and that would have raised a similar question as to the Choctaw freedmen's allotments.

If the proviso had related only to the allotments to Chickasaw freedmen, it would have been natural for the language not to speak generally of "allotments to freedmen" as it did, but to speak of "allotments to said (or such) freedmen" or "allotments to Chickasaw freedmen." Three times earlier in the same paragraph "Chickasaw freedmen" are mentioned, and twice just before the proviso "said freedmen" are referred to. The mention in the proviso, in the alternative, of "the money, if any, recovered as aforesaid," does not, we think, make it certain that the proviso was speaking only of the Chickasaw freedmen's allotments. It no doubt included them, but we think it also included the Choctaw allotments.

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, after having maintained it consistently for so long. If it had so yielded in 1902, it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim, at a time when the Chickasaws were not even represented by an attorney. We have no doubt that the Choctaws understood the proviso as we have interpreted it. [fol. 40] We conclude, therefore, that the arrangement of the Atoka agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation. Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a).

The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that that defendant is unable to satisfy whatever judgment may be

rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

[fols. 41-42] IX. JUDGMENT

At a Court of Claims held in the City of Washington on the 1st day of December, A. D., 1941, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that plaintiff is entitled to recover against the defendant, The Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings. (See Rule 39a.)

X. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On January 19, 1942, the defendant, The Choctaw Nation, filed a motion for a new trial.

On February 2, 1942, the court entered the following order on said motion:

Order

It Is Ordered this 2nd day of February, 1942, that the defendant, the Choctaw Nation's motion for new trial be and the same is hereby overruled.

[fol. 43] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on Cover: Enter William G. Stigler. File No. 46,498. Court of Claims, Term No. 1170. The Choctaw Nation of Indians, Petitioner, vs. The United States and The Chickasaw Nation of Indians. Petition for a writ of certiorari and exhibit thereto. Filed April 23, 1942. Term No. 1170 O. T. 1941.

[fol. 44] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 80

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.